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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER	
MADSEN, ROBERT A	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 12/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/780,273	FROSETH ET AL.	
	Examiner	Art Unit	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *04 October 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *84-115* is/are pending in the application.

4a) Of the above claim(s) *84-98 and 100-112* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *99 and 113-115* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *8/25/04*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. The Amendment filed October 4, 2004 has been entered. Claims 1-83 have been cancelled and claims 100-115 have been added. Claims 84-115 remain pending in the application.

2. Newly submitted claims 84-98 and 100-112 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

- Claims 84-87,100-103 are directed to "a method comprising providing a popcorn snack in the presence of sucralose...enclosed in a microwave package". The originally presented claims, however were directed to a method for *preparing a customized food product* comprising *popping* popcorn in the presence of sucralose . The inventions differ in the purpose of the method, and the actual steps followed: providing popcorn in a package versus popping popcorn.
- Claims 88-90,104-107 are directed to "a method comprising providing a popcorn snack in the presence of acesulfame K...enclosed in a microwave package". The originally presented claims, however were directed to a method for *preparing a customized food product* comprising *popping* popcorn in the presence of acesulfame K. The inventions differ in the purpose of the method, and the actual steps followed: providing popcorn in a package versus popping popcorn.

- Claim 91 is directed to a method comprising *providing* an *unpopped popcorn* composition in the presence of oil, salt and sucralose.. The originally presented claims, however were directed to a method for *preparing a sweet and salty popcorn food* comprising *popping popcorn by microwave treating* in the presence of oil, *an amount of salt to provide a salty taste*, and *a sweetening effective amount of sucralose*. Even without considering the sweet and salty effective amount limitations, the inventions differ in the purpose of the method by reciting *providing* unpopped popcorn without any heat step limitation versus *popping* popcorn by microwave treating.
- Claims 92-95 and 111 are directed to "a customized food product comprising a popcorn snack combined with sucralose prior to being popped...packaged...and for popping in the microwave" . The originally presented claims however, were directed to a customized food product that was packaged...and *prepared* in a microwave oven. Thus, the inventions differ in that the originally presented product was a prepared, or popped, popcorn versus the currently recited "prior to being popped".
- Claims 96-98, and 112 are directed to "a customized food product comprising a popcorn snack combined with acesulfame K prior to being popped...packaged...and for popping in the microwave" . The originally presented claims however, were directed to a customized food product that was packaged...and *prepared* in a

microwave oven. Thus, the inventions differ in that the originally presented product was a prepared, or popped, popcorn versus the currently recited "prior to being popped".

3. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claim 84-98 and 100-112 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claim Rejections - 35 USC § 112

4. In light of the amendment, the rejection of claim 99 under 35 U.S.C. 112, first and second paragraph is withdrawn.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claim 99 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat(GB 2250266 A) in view of Google Groups (12/9/199).

6. Ezzat teaches preparing popcorn in microwave oven by placing butter as salt , sugar and unpopped kernels in a pouch for one time use for a single user,

which would serve as a single serving microwave pouch as recited in claims 84,91 and 99 (Page 3, lines 1-23). Ezzat is silent in teaching adding a sweetening effective level of sucralose, as recited in claims 84,91 and 99.

7. Google Groups teaches how to make a low carbohydrate popcorn by combining commercially available microwave popcorn with sucralose (i.e. Splenda) to achieve a sweet flavor, i.e. caramel corn (Page 1, 12/9/1999 message).

8. Therefore, it would have been obvious to modify Ezzat and include sucralose in the bag since Google Groups teach adding sucralose will provide a low carbohydrate, sweet and salted popcorn product.

9. Claims 99 and 113 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lemke et al. (US 5747080) in view of Daenkindt (EP335852A) and Google Groups (12/9/199)

10. It is noted that Claim 99 is much broader than the originally presented claim 99 in that there is no longer a limitation directed to a particular level of salt or an effective amount of sucralose. As such a new rejection is appropriate.

11. Lemke teaches it is notoriously known to add fat, sugar, salt, and/or sugar substitutes to popcorn before popping of the grain. Lemke further teaches it is known to heat such a composition in the microwave (Column 1, lines 23-32). Lemke, however, is silent in teaching the particular sugar substitutes one may include.

12. Daenkindt et al. teach sugar substitutes and teach that a mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (English Abstract, Page 2).

13. Google Groups is relied on as evidence of the desirability of including a sugar twin or sucralose, in combination with microwave popcorn, in order to obtain a low carbohydrate, which would also be low calorie, popcorn (Page 1, 12/9/1999 message).

14. Therefore, it would have been obvious to modify Lemke and include both sucralose and ace-K , since Lemke teaches using sugar substitutes and Daenkindt et al. teach sucralose and ace-K in combination allows one to reduce the level of sugar and provide a low calorie food product and Google Groups teach it is desirable to provide a low calorie sweetened microwave popcorn product.

15. Claims 99,113,114 and 115 are rejected under 35 U.S.C. 103(a) as being unpatentable over Belleson et al. (US 4751090) in view of Lemke et al. (US 5747080) and Daenkindt (EP335852A) and Google Groups (12/9/199).

16. Belleson et al. teach a microwave popcorn composition comprising unpopped popcorn, salt, fat, sugar and cinnamon (Column 2, lines 10-45). However, Belleson et al. are silent in teaching sucralose and acesulfame K, as recited in claims 99 and 113.

17. Lemke et al. are relied as evidence of the conventionality of providing a microwave popcorn composition with a sugar substitute. Lemke teaches it is notoriously known to add fat, sugar, salt, and/or sugar substitutes to popcorn before popping of the grain. Lemke further teaches it is known to heat such a composition in the microwave (Column 1, lines 23-32).

18. Daenkindt et al. teach sugar substitutes and teach that a mixture comprising saccharose, sucralose, and acesulfame K has the same sweetening power as saccharose per unit volume but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (English Abstract, Page 2).

19. Google Groups is relied on as evidence of the desirability of including a sugar twin or sucralose, in combination with microwave popcorn, in order to obtain a low carbohydrate, which would also be low calorie, popcorn (Page 1, 12/9/1999 message).

20. Therefore, it would have been obvious to modify Belleson et al. and include a sugar substitute, such as sucralose and acesulfame K, since Lemke et al. teach it notoriously well known to include a sugar substitute with an unpopped popcorn microwaveable composition, and Daenkindt et al. teach sucralose and acesulfame K in combination will allow one to reduce the sugar of a food composition so that one can have a reduced caloric value, which according to Google Groups is desirable in a microwave popcorn product.

Response to Arguments

21. With respect to claims 84-98 are directed to the claims as currently amended, which have been withdrawn from consideration.

22. With respect to claim 99, Applicant asserts there is no motivation to substitute sucralose for sugar in the composition of Ezzat. However, Ezzat teaches a microwave popcorn composition comprising sugar to achieve a sweet popcorn. Google Groups teaches it is desirable to use sucralose to treat microwave popcorn to achieve a low carbohydrate sweetened popcorn. That is, Google Groups recognizes sucralose as a sugar substitute for sweetening microwave popped popcorn. Thus, Google Groups provides motivation for modifying Ezzat and substituting sucralose for sugar in the microwave popcorn bag since Google Groups teaches a desired sweet microwave popcorn includes sucralose, rather than sugar.

23. Applicant further argues that at the time *Ezzat* had filed, a sucralose composition could not be legally sold, and thus such a combination would not have been obvious. However, Applicant is directed to 35 U.S.C. 103 (a), obviousness is not based on when a reference was filed, but rather one considers if " the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art".

24. Applicant further argues that neither reference recognizes the problem of Applicant. However, it appears that Applicant's disclosure is actually directed to preparing customized food products. Applicant discloses popcorn products,

microwave popcorn packages, salt, oil, and sucralose, and not in any specific combination or microwave popcorn composition.

Conclusion

25. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

26. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

27. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

28. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax

phone number for the organization where this application or proceeding is assigned is 703-872-9306.

29. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
Art Unit 1761

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